

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

JUN 13 1997
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In the Matter of)	
)	CC Docket No. 96-98
Implementation of the Local Competition)	
Provisions in the Telecommunications Act)	
of 1996)	
)	
Interconnection between Local Exchange)	CC Docket No. 95-185
Carriers and Commercial Mobile Radio)	
Service Providers)	
)	
Requests for Clarification of the Commission's)	
Rules Regarding Interconnection Between)	CPD 97-24
LECs and Paging Carriers)	
_____)	

To: The Commission

COMMENTS OF PAGEMART WIRELESS, INC.

PageMart Wireless, Inc. ("PageMart"), by its attorneys, hereby submits its Comments in the above-referenced proceedings. PageMart is an innovative paging and narrowband PCS company with Commercial Mobile Radio Service ("CMRS") licenses for paging services throughout the United States. It provides low-cost, nationwide services and, in connection with the provision of these services, contracts with several local exchange carriers ("LECs") for the provision of interconnection.

In a public notice dated May 22, 1997 (DA 97-107), the Common Carrier Bureau asked interested parties to comment on two letters received by the Bureau from Southwestern Bell Telephone Company ("SWBT") and one letter received from AirTouch Communications, Inc., AirTouch Paging, AT&T Wireless

Services, Inc., and PageNet, Inc. (collectively, the "Paging Providers"). These letters discuss the Commission's regulations and policies regarding interconnection between LECs and paging carriers.

SWBT, in its April 25, 1997 letter (the "SWBT Letter"), contended that the Commission's rules permit LECs to charge paging carriers for the costs LECs incur in delivering LEC-originated traffic to paging networks. PageMart disagrees strongly with this contention and supports the positions taken by the Paging Providers in their May 16, 1997, letter to the Common Carrier Bureau. As explained below, several aspects of the SWBT Letter are troubling or simply wrong, and the Commission should decline to clarify the rule in the manner requested by SWBT.

I. SWBT's Position is in Direct Contravention of the Plain Language of Section 251(b) of the Telecommunications Act and Section 51.703(b) of the Commission's Rules.

Section 251(b)(5) of the Telecommunications Act of 1996^{1/} requires each telecommunications carrier to establish "reciprocal compensation arrangements for the transport and termination of telecommunications." CMRS providers are telecommunications carriers, and they terminate LEC-originated traffic. They are therefore entitled, under the statute, to compensation for termination of this traffic. It logically follows that CMRS providers are not required to pay for termination of LEC-originated traffic.

^{1/} 47 U.S.C. § 251(b)(5).

Section 51.703(b) of the Commission's rules implements the statutory mandate of Section 251(b)(5) by clearly and unambiguously prohibiting LECs from charging CMRS providers for the traffic that originates on the LECs' networks:

A LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network.^{2/}

In the order promulgating the rules implementing Section 251(b)(5), the Commission was careful to specify that paging carriers are included in the class of CMRS providers covered by the rules governing reciprocal compensation.^{3/} And if any further clarification were needed, the Common Carrier Bureau has explicitly stated that Section 251(b)(5) prohibits LECs from charging CMRS carriers to terminate traffic that originates on the LECs' networks.^{4/}

The policy embodied in Section 51.703(b) can also be found in Section 20.11 of the Commission's rules,^{5/} which likewise mandates reciprocal compensation between LECs and CMRS providers. The Commission has confirmed that Section 20.11 is violated by LEC attempts to charge CMRS providers for terminating LEC-

^{2/} 47 C.F.R. § 703(b). Although Section 51.703 was originally stayed by the U.S. Court of Appeals for the Eighth Circuit, the court lifted the stay with respect to that section on November 1, 1996. Iowa Utils. Bd., et al. v. FCC, No. 96-3321 (8th Cir., Nov. 1, 1996).

^{3/} Interconnection Order, 11 F.C.C. Rcd. at 15997.

^{4/} Letter from Regina M. Keeney, Chief, Common Carrier Bureau, to Cathleen A. Massey, Kathleen Q. Abernathy, Mark Stachiw, and Judith St. Ledger-Roty, March 3, 1997.

^{5/} 47 C.F.R. § 20.11.

originated traffic.^{6/} Thus, when Section 51.703(b) was promulgated, it served to provide a more specific enunciation -- a "clarification" -- of existing Commission policy.

In one of the first decisions by an impartial body interpreting Section 251(b)(5) in the context of a compensation claim by a CMRS carrier, the California Public Utilities Commission ("CPUC") recently agreed with the interpretation of the statute set forth above. The CPUC found an Arbitrated Interconnection Agreement between Cook Telecom, Inc. ("Cook Telecom"), a one-way paging company, and Pacific Bell to be inconsistent with Section 251(b)(5) of the federal statute.^{7/} In determining that Cook Telecom was entitled to transport and termination compensation, the CPUC rejected Pacific Bell's argument that the one-way nature of paging services, and the fact that paging providers do not originate any calls for termination on the LECs' network, somehow render paging carriers ineligible for termination compensation:

We fail to discern any public policy that Congress intended to further by denying such compensation to one-way paging carriers when, at the same time, Congress went to such great lengths to grant such carriers the right to interconnect and compete on an equal footing under the Act.^{8/}

^{6/} Interconnection Order, 11 F.C.C. Rcd. at 16044.

^{7/} Application of Cook Telecom, Inc. for arbitration pursuant to Section 252 of the Federal Telecommunications Act of 1996 to establish an interconnection agreement with Pacific Bell, Application 97-02-003 (interim opinion) (California Public Utilities Commission, May 21, 1997).

^{8/} Id. at 4.

In light of the foregoing, it is surprising that SWBT and other LECs continue to assert that they may charge paging carriers for delivering LEC-originated traffic to paging networks.

II. Section 251(b) of the Telecommunications Act and Section 51.703(b) of the Commission's Rules Do Not Contain an Exemption for Facilities-Based Charges.

SWBT's alternative claim is that, even if LECs are not entitled to charge paging carriers for LEC-originated traffic terminated by paging carriers, a LEC is nonetheless permitted to charge paging carriers for the facilities used to transport that traffic to the interconnecting paging carrier's network. As was made clear in the Paging Providers' letter, however, the facilities in question are part of the LEC's network, installed by the LEC to handle LEC-originated traffic.

SWBT attempts to avoid the explicit language of Section 51.703(b) by drawing a distinction between per-minute charges and charges for facilities, and claiming that the latter are not included in the rule. The Commission stated in Section 51.703(b) that LECs may not assess charges on CMRS providers for local traffic that originates on LEC networks. The Commission did not qualify its rule by specifying that only per-minute charges are prohibited. In fact, to permit LECs to assess facilities-based charge for the termination of LEC-originated traffic would be inconsistent with the Commission's goal in implementing the statute -- namely, to provide compensation to the party that terminates the traffic originating on the LEC's network.

As a final attempt to avoid the plain language of Section 51.703(b), SWBT claims that the Paging Providers' interpretation of Section 51.703(b) -- a straightforward reading of the text -- renders superfluous another provision of the Commission's rules, Section 51.709(b). This contention is also inaccurate. Section 51.709 operates to simplify the rate structure for bi-directional traffic that shares the same dedicated facilities. This rule provides that a carrier which originates traffic that is terminated on the facilities of a LEC must compensate the LEC for the use of those facilities. The rule does not apply, in other words, unless a carrier seeks to purchase LEC facilities in order to terminate traffic. Thus, Section 51.709 is not relevant to the paging industry and not relevant to the interpretation of Section 51.703(b).

III. The SWBT Position Is in Direct Contravention to the Congressional Intent Underlying the Enactment of the Telecommunications Act.

The SWBT Letter misconstrues the economic policy underlying Section 251(b) of the Telecommunications Act and perpetuates an inaccurate perspective on termination compensation. Congress developed Section 251(b) to further the goals of reciprocity among telecommunications providers.

The general operation of the telephone network relies on cooperation among telecommunications providers that operate in tandem to facilitate communications. When communications are originated and terminated within the same LATA, by the same LEC, all costs are incurred by the same LEC. Thus, the costs of the communication can easily be recouped by the LEC from its subscribers. When communications are originated and terminated by two different

telecommunications providers, the costs are borne by both providers. Only the originator of the communication, however, may recoup the costs from its subscriber. Section 251(b) facilitates the allocation of costs by requiring telecommunications carriers to provide reciprocal compensation to each other for these costs.

SWBT mischaracterizes the situation when it states that the Commission's rule would amount to unlawful free provisioning of services to paging providers at LEC rate-payers' expense.^{9/} There is no free provisioning; LECs receive a benefit from the existence of paging providers in the same way that they receive a benefit from the existence of other LECs or other telecommunications providers that provide the incentive for LEC subscribers to pick up the telephone and initiate a communication. The paging situation is not different from the situation in which one LEC originates a telephone call and another LEC terminates the call. LECs are not bearing the costs of paging providers' services; they are bearing the costs of their own services to their subscribers. In addition, LECs are incurring a cost for the telecommunications provider that terminates the communication and compensation is due to that party.

Finally, PageMart takes issue with language in SWBT's follow-up letter to the Commission, dated May 9, 1997. SWBT states that, "[i]n the spirit of good faith, [it] would like to continue to provision new facilities to all pagers for a reasonable period of time."^{10/} SWBT's "good faith" is irrelevant here. SWBT must

^{9/} SWBT Letter at 1-2.

^{10/} SWBT May 9 Letter at 1. It is not clear from the letter whether SWBT is in fact "provision[ing] new facilities," or merely is stating what it "would like" to (continued...)

continue to provision new facilities because to do otherwise would be illegal. SWBT and other LECs must legally continue to provide services and facilities to paging providers.

IV. SWBT Cannot Now Request that the Commission Reconsider Its Rule.

PageMart agrees with the Paging Providers that SWBT has taken an inappropriate procedural approach, masking what is essentially a request for reconsideration in the guise of a request for clarification. The principal FCC regulation that SWBT wishes to be "clarified" is Section 51.703(b),^{11/} which was promulgated by the Commission subsequent to a rulemaking procedure that concluded with the release of an order on August 8, 1996.^{12/} SWBT had the opportunity to file a petition for reconsideration by the deadline of September 30, 1996,^{13/} but it failed to do so.

^{10/}(...continued)

do. PageMart has had recent experience with at least one other LEC, however, which is refusing to provision new facilities, in direct contravention of the law, until PageMart makes payments that it is not required to make.

^{11/} 47 C.F.R. § 51.703(b).

^{12/} Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 11 F.C.C. Rcd. 15499 (1996) ("Interconnection Order").

^{13/} See 47 C.F.R. §§ 1.429(d); 1.4(b)(1). Notice of the Interconnection Order was given in the Federal Register on August 29, 1996, 61 Fed. Reg. 45476-01 (1996).

SWBT cannot now pretend that this deadline has not passed and submit an untimely petition for reconsideration.^{14/} In any event, as discussed above, it is difficult to see how there could be any uncertainty about the plain language of Section 51.703(b) of the Rules. If SWBT is unhappy about this language, it is free under the Commission's Rules to submit a petition for rulemaking^{15/} and request that the Commission change this clear and unambiguous rule. SWBT, however, has failed to take this approach.^{16/}

V. Conclusion.

PageMart respectfully requests that the Commission reaffirm that Section 51.703(b) means exactly what it says: that LECs may not charge CMRS providers for the termination of LEC-originated traffic. In addition, the Commission should affirm that it, not state public utilities commissions, has ultimate jurisdiction over the enforcement of Section 51.703(b) and that the FCC intends to enforce the rule. As long as the LECs believe that there is ambiguity with respect to the enforcement of this rule, they will continue to attempt to assess on CMRS providers illegal charges for termination of LEC-originated traffic, garnering a windfall from

^{14/} The deadline for petitions for reconsideration set forth in 47 C.F.R. § 1.429 is statutory, see 47 U.S.C. § 405, and hence cannot be extended or waived by the Commission.

^{15/} See 47 C.F.R. § 1.401.

^{16/} In one sentence, the SWBT Letter suggests "alternatively" that SWBT is "petition[ing] for a change in the rules." SWBT Letter at 2. If SWBT is in fact seeking a rule change, its Letter is procedurally defective under Section 1.401 of the Rules, 47 C.F.R. § 1.401.

their noncompliance to the extent that CMRS carriers meet the LECs' unlawful demands. Finally, the LECs should be told to cease immediately their threats to cut off service to (and refusal to provision new service for) those CMRS carriers that insist on LEC compliance with the law.

Respectfully submitted,

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Date: June 13, 1997

CERTIFICATE OF SERVICE

I, G. Paul Smith, hereby certify that I have on this 13th day of June 1997, caused to be served a copy of the Comments of PageMart Wireless, Inc. by first-class U.S. Mail, postage prepaid, upon the following:

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